

**STATE OF MAINE  
DEPARTMENT OF MARINE RESOURCES**

<b>IN THE MATTER OF THE APPLICATION OF</b>	)	
<b>MAINE COAST NORDIC, ROBERT A. CATES AND</b>	)	<b>FINDINGS OF FACT,</b>
<b>ROBERT N. CATES, FOR THE RENEWAL</b>	)	<b>CONCLUSIONS OF LAW</b>
<b>OF AN AQUACULTURE LEASE LOCATED IN THE</b>	)	<b>AND DECISION</b>
<b>LITTLE RIVER, CUTLER HARBOR, CUTLER,</b>	)	
<b>WASHINGTON COUNTY, MAINE</b>	)	

On March 26, 1997, Maine Coast Nordic, Robert A. Cates and Robert N. Cates, made application for renewal of an aquaculture lease issued to them on December 16, 1987. The application requested a ten year renewal to December 15, 2007 of a 6.3 acre finfish lease located in the Little River, Cutler Harbor, Cutler, Washington County, Maine.

Notice of the application for lease renewal was published in the January 1998 issue of Commercial Fisheries News and the December 17, 1997 and December 31, 1997 issues of the Machias Valley Observer. Members of the public and interested parties were given to January 16, 1998 to request a hearing on the application for lease renewal. On January 16, 1998, five written requests for a public hearing on the lease renewal were received. A public hearing on this renewal application was held on Thursday, August 6, 1998 at 3:00 p.m. in Cutler, Maine.

Applications for aquaculture lease renewals are governed by 12 M.R.S.A., Section 6072(12), which provides that an aquaculture lease may be renewed if the lessee has complied with the original lease agreement during its term, that aquaculture has been conducted on the original lease, and the renewal will not cause the lessee to be a tenant of any kind in aquaculture leases covering an aggregate of more than 250 acres.

**Evidence Introduced Concerning the Nature  
and Impact of the Proposed Lease**

The site manager, Robert A. Cates, presented testimony on the applicant's request for a ten year renewal of its 6.3 acre lease. The lease is located on the western shore of Little River, Cutler Harbor, Cutler. He testified that all conditions and legal requirements had been met during the previous lease term. Aquaculture has been conducted on the lease during each year of the lease. The

boundary has been marked and the lease holders do not lease acreage in excess of the statutory limit. He explained that the site and area had been maintained and kept clean of debris or litter from their activities. All associated monitoring and lease fees have been paid. The written request for renewal was entered for the record. Exhibit 5.

The site manager was asked to compare fishing in the lease area in 1987 to the present. He testified that there has been lobster fishing and that in his opinion there has been no impact to lobster fishing within the open areas of the lease.

A representative of the intervenors opposed to the lease renewal asked if the applicant had paid a fine of \$80,000 to the U.S. Army Corps of Engineers (ACOE) for a violation of their ACOE permit. The site manager explained that it was his understanding that there had been no violation of any state laws or regulations since the lease was granted. He stated that he was not directly involved with the management affairs of the lease during the early part of the lease. The applicant's attorney requested clarification of the question to understand if it was meant to include any violation of any rule or regulation of any agency, state, local or federal, applicable to this lease from the date of the signing of the lease. The intent was clarified and meant to include all of the agencies. The applicant's attorney provided information that a violation of the applicant's permit with the ACOE occurred in May, 1988. The applicant was issued its ACOE permit and subjected to a penalty for placement of pens without authorization at that time.

The hearing record was held open for ten days for the applicant to provide, in writing, the contact date by the ACOE regarding their permit violation. Upon receipt of that information, it was sent by certified, return receipt mail to the intervenors. The intervenors were given ten days from their receipt of that information to submit comment on the ACOE contact date regarding the violation. No written comments were received during that time.

An environmental consultant presented testimony on the environmental impacts and monitoring data of the lease site. The consultant testified about his qualifications and experience with the Department's monitoring program that was initiated for all finfish leases in 1992. He described the location and boundary coordinates of the lease. Exhibit 1. He testified that part of the applicant's

husbandry and maintenance is a plan for shifting the pen system within the lease boundaries, every 12 to 18 months, depending upon when fish are harvested. The monitoring includes diver surveys of the bottom, bottom samples that are collected for various analyses and underwater videos. The monitoring is conducted along the pens and 200 feet beyond the ends of the system's long axis. A diagram of the pens that described the alternate layout for shifting the pens with the diver survey transects and sampling stations was presented. Exhibit 2.

A summary of the monitoring data that included bottom samples used for benthic community analysis, Exhibit 3, sediment analysis and water quality oxygen profiles was presented by the consultant. The data indicated that impact of the operation on the bottom to the benthic community (the organisms living in or on the bottom) was restricted to the area directly beneath the pens. The results of the water quality oxygen profiles indicated that any decrease in oxygen saturation was limited to the immediate vicinity of the pens. The mean saturation level of 91.8, 300 feet upstream was equivalent to the 300 foot downstream level with the mean saturation level of 89.0 at only 15 feet downstream. These levels are well above the Department of Environmental Protection Agency's 85% saturation standard. He stated that these numbers were characteristic of most sites in Maine.

The consultant provided a graphic representation of the underwater video taken May 20, 1998. Exhibit 4. The operation's impact was restricted to the area directly beneath the pens. Impacts were observed in the form of bacterial mold patches and clumps of mussels on a mud bottom. Mussels generally come from the nets as they are washed off the nets during routine cleaning.

The consultant was asked on what basis he would determine the recovery rate of the impacted bottom. He described two studies, one in Eastport and the other in Cutler, that he worked on with the Department to determine recovery rates. The results of those studies indicated that recovery was rapid immediately following removal of the pens or activity. Then the rate plateaus with steady or continued improvement. He felt that one of the study sites was comparable to this lease and he would expect similar recovery rates.

There were four intervenors, each opposed to the lease renewal. Intervenor David W. Cline was chosen to present the intervenors' consolidated testimony. He testified that the lease interfered with

their ability to fish for herring in Cutler harbor. He stated that the lease site and nearby area was their traditional fishing grounds. He explained that they fished for herring using a weir beginning in 1981 in the harbor. In his opinion, the fish pen nets violate 12 M.R.S.A. §6525-A(1), Setting Nets on Seines Near Weirs, because the pens were within 2000 feet of a weir when it was originally granted. He testified that the lease interferes with his ability to lobster fish and drag. He stated that he could drag the area of the lease prior to it being granted. It was his opinion that the economic benefits described by the site manager were unfair to the intervenors because the lease interfered with their ability to use the site for fishing. The intervenors also opposed the renewal because the lease holder paid a fine for a violation of their ACOE permit in May, 1988 which in their opinion violated Department regulations.

The intervenor representative was asked if they had challenged the issuance of the lease or any factual decisions reached by the Department in 1987. He testified that they had not.

The intervenors also discussed a different lease that was granted by the Department in the Town of Cutler in 1993. In that decision, the Department found, based upon the testimony of the representatives of the Town of Cutler, the only entity that could issue weir permits in Cutler, that there were no valid weirs in Cutler. The intervenors challenged the Department's issuance of that lease in Superior Court. That challenge was dismissed by the Superior Court for Kennebec County.

The intervenor representative was asked what type of dragging he did in the lease site prior to 1987 that he could no longer do now. He responded that he dragged the area for urchins. He added that he could not drag there now due to 12 M.R.S.A. §6957, that prohibits dragging within 300 feet of the pens.

He was asked how the lease interfered with his ability to fish for lobster. He stated that his traps became tangled in the mooring lines, therefore he could not fish for lobster at the lease site.

A fisherman familiar with the history of fishing in Cutler Harbor provided testimony. He stated that, compared to when he was younger, lobsters are now more plentiful in the harbor year round. Years ago, they were fished only for about a month in the fall. He testified that he and another person were the first persons to harvest urchins in Cutler. He stated that they began fishing for urchins in 1992-93 and, therefore, the initial granting of the lease could not have caused a conflict with the urchin fishery

as it did not yet exist. He testified that urchin dragging has only occurred during the past few years in the head of the harbor, or around the Little River Island at the mouth of the harbor, not around the lease site which has a mud bottom that is unfavorable to urchins. The fisherman testified in support of the lease. In his opinion, the local lobster fishermen benefited from the lease granting by removing 2-3 sizable lobster fishermen (highliners) from that fishery to the aquaculture industry instead. The change opened up opportunities for others to enter into the lobster fishery. He also gave an example of how the applicant's activities benefited the local fishing community. He stated that the applicant had installed a hoist at a local wharf which all fishermen could and have used freely. The intervenor asked if he had caught herring in the harbor since the pens were installed. The fisherman answered that he had not.

Another fisherman, who stated he had fished lobster in Cutler Harbor for 17 years, testified in support of the lease. He testified that the moorings did not prohibit him from fishing lobster around the pens, even when he was a teenager. He compared fishing around the moorings to fishing near another fisherman's lobster traps and said that it was not a problem. He felt that the pens improved lobster fishing. Regarding the herring fishery, he explained that when herring were caught in the harbor, they were caught by seines (nets), not in weirs.

The intervenor asked the fisherman if he had seen fish caught in the harbor since the lease was granted. The fisherman stated that he had not seen herring in the harbor, or outside the harbor along the coast south from Lubec. Herring that were fished in the harbor were caught by seine prior to when the pens were installed. He explained that the herring come and go in cycles. The cycle when the fish were caught on the shore, in coves, or in Cutler Harbor ended prior to the installation of the pens.

A member of the Department's Lobster Advisory Council, who was also a former herring fisherman, provided supportive testimony and information on the history of the herring fishery in Cutler. He stated that he fished for herring full time in the 1970's and early 1980's. He stated that the last year herring were caught in Cutler Harbor was approximately 1981. There was a large catch of herring by stop seine when a group of whales chased herring into the harbor on the wrong side of the tide and time of day. The year following the last catch, weirs were staked out in the harbor. To his knowledge, no herring have been caught, pumped on a sardine carrier, and sold since approximately 1981 to 1982. He

testified that if herring were around, then stop seines or purse seines could be set in the harbor, including the area around the pens. He stated that the lease activities had improved the lobster fishing in the area of the pens. The lease area is mostly mud bottom that was never traditionally fished for lobsters prior to the lease.

A Cutler resident, Linda Throckmorton, provided testimony. In her opinion, the initial lease was granted unfairly by the Department. She also stated her disapproval of the ACOE permit process and ACOE permit violation by the lessee.

### **Findings of Fact**

Based on the testimony and Department records, the applicant has conducted aquaculture within the lease throughout the previous lease term.

According to the testimony and Department records, the applicant has complied with the terms and conditions of the lease including marking requirements mandated by changes in the law, 12 M.R.S.A. §6957, that require corners to be marked with two foot yellow buoys (balloon type buoys). The intervenors claim that the lease should not be renewed because the applicant paid a fine for a violation of an ACOE permit requirement in May, 1988. During the late 1980's, the permitting agencies for finfish aquaculture were developing a new permit process. Confusion about the various agencies' requirements was common. The Department was previously the only lease permitting agency and therefore was lenient with the other agencies' requirements under development that were new to lease holders who had previously been fully licensed through only the Department. The applicant was required, under the original lease, to obtain all applicable permits including the ACOE permit. In May 1988 the applicant incurred an ACOE penalty for unauthorized placement of pens. The ACOE violation did not result in the non-issuance or revocation of the ACOE permit. The violation was not considered to be of a magnitude to warrant a lease revocation by the Department and compliance with the State lease to obtain the ACOE permit was met to the satisfaction of the Department. This information, taken into consideration with the applicant's compliance with all Department monitoring, administrative fees, records, and lease requirement throughout the previous term, indicates that the prior applicant has met all applicable requirements satisfactory to the Department.

Testimony was presented by the intervenors that the lease should not be renewed because the site was traditional fishing grounds for lobster fishing, dragging and herring fishing when the lease was initially granted. Credible testimony was given by three local fishermen, who provided contradictory information to the intervenors' claims regarding traditional fishing uses of the lease. The most credible testimony indicated that there are no new fisheries, nor were there existing fishery conflicts when the lease was initially granted that pose unreasonable interference with those fisheries within the lease site. The intervenors indicated that they were aware of the opportunity to challenge the initial decision and chose not to challenge that decision. The choice to not challenge the decision, when there was the opportunity to do so, weakens their objection to the lease renewal based on the same objections to the original lease application that were rejected in that decision. In addition, the intervenors' challenge to the issuance of a second lease in Cutler, in which the Department had concluded, among other things, that there were no valid weirs permitted by the municipality of Cutler, was dismissed by the Superior Court for Kennebec County. †

Based on the testimony and evidence, I find that renewal of the lease is in the best interests of the State.

### **Conclusions of Law**

The evidence in the hearing record held August 6, 1998, support a finding that the lessee meets the requirements for the renewal for an aquaculture lease set forth in 12 M.R.S.A. §6072(12).

### **Decision**

The Commissioner of Marine Resources grants the requested lease renewal of Maine Coast Nordic, Robert A. Cates and Robert N. Cates, located in Little River, Cutler Harbor, Cutler, Maine for a

† In the intervenors' comments on the proposed decision, they contend that a weir must be considered properly permitted whenever an individual mails proof of bonding to the Department. That position is rejected because the Department does not license or permit weirs, they are licensed by the municipalities in accordance with authority granted to municipalities by the legislature in 38 M.R.S.A. §1022.

period of ten years to December 16, 2007 for the purpose of cultivating Atlantic salmon and rainbow trout using pen culture techniques. Maine Coast Nordic, Robert A. Cates and Robert N. Cates, remains subject to the same terms, conditions, and obligations set forth in the original lease. The applicant shall

continue to pay the State of Maine rent in the amount of \$50.00 per acre per year. The applicant shall continue to post a bond or establish an escrow account in the amount of \$5,000.00.

**Conditions to be Imposed on Lease**

The following condition is placed on this lease: marker buoys must be placed on the boundaries of the lease area indicating the presence of submerged mooring cables and nets.

The Commissioner may commence revocation procedures if he determines that substantial aquaculture has not been conducted within the preceding year, or that the lease activities are substantially injurious to marine organisms. If any of the conditions or requirements imposed in this decision, in the lease, or in the law are not being observed, the Commissioner may revoke the aquaculture lease.

**Dated: George D. Lapointe (Commissioner) Department of Marine Resources**